

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

BOBBY G. TODD,

Plaintiff,

v.

STATE OF OREGON, et al.,

Defendants.

No. 3:13-cv-01859-HU

**INITIAL REVIEW ORDER  
and**

**FINDINGS AND RECOMMENDATION**

HUBEL, Magistrate Judge:

Plaintiff Bobby Todd ("Plaintiff") brings this action pro se against the State of Oregon, Washington County and the City of Portland (collectively, "Defendants"). Plaintiff's complaint alleges a single claim for violation of the First Amendment of the United States Constitution, which invokes this Court's federal question jurisdiction. See 28 U.S.C. § 1331. The entirety of Plaintiff's allegations in support of his First Amendment claim are as follows: "City of Portland is not allowing place for homeless. Washington County allowed, with knowledge false criminal charges to be prosecuted against [Plaintiff]. State of Oregon in conspiracy

1 to violate Constitutional freedoms, with knowledge of  
2 [P]laintiff['s] relig[i]ous and political view for an ongoing train  
3 of abuses." (Compl. at 3.) Plaintiff seeks damages in the amount  
4 of one billion dollars. (Civil Cover Sheet at 1.)

5 Now before the Court is Plaintiff's application to proceed in  
6 proceed in forma pauperis and motion for appointment of pro bono  
7 counsel. The application (Docket No. 1) to proceed in forma  
8 pauperis is granted solely for the purpose of this Initial Review  
9 Order. For the reasons stated below, however, Plaintiff's  
10 complaint should be dismissed with prejudice and Plaintiff's motion  
11 (Docket No. 3) for appointment of pro bono counsel should be denied  
12 as futile.

#### 13 I. PLAINTIFF'S LITIGATION HISTORY

14 The Court begins by noting that Plaintiff is no stranger to  
15 the federal court system here in Oregon. Taken cumulatively, the  
16 cases described below appear to have addressed and disposed of the  
17 very allegations underlying Plaintiff's complaint. For example,  
18 Plaintiff once brought an action pro se on behalf of himself and  
19 the "People of the United States," against President Barack Obama,  
20 the State of Oregon and Washington County. Todd v. Obama, No.  
21 3:11-00715-AC, slip op. at 2 (D. Or. Nov. 9, 2011) (Simon, J.).  
22 Plaintiff alleged, in relevant part, that: (1) the State of Oregon  
23 knowingly allowed violations of the United States Constitution as  
24 a means of implementing political objectives; (2) the State of  
25 Oregon fabricated "false process delivery charges" and participated  
26 in depriving citizens the right to bear arms; (3) Washington County  
27 refused to stamp subpoenas and charged Plaintiff with the crime of  
28 "false process delivery"; and (4) Washington County participated in

1 forms of "torture, isolation, refused dental attention, and theft  
2 of property." *Id.*

3 After confirming the provisional in forma pauperis status  
4 given to Plaintiff, Judge Simon dismissed his complaint, without  
5 service of process, pursuant to 28 U.S.C. § 1915(e). *Id.* at 1.  
6 Notably, Judge Simon determined that Plaintiff's claim against the  
7 State of Oregon was frivolous and subject to sua sponte dismissal  
8 based on the fact that states are not persons for purposes of 42  
9 U.S.C. § 1983 and the fact that the State of Oregon has not  
10 consented to be sued in federal court or otherwise waived its  
11 immunity. *Id.* at 4-5. Judge Simon also determined that  
12 Plaintiff's claims against Washington County must be dismissed  
13 because he did not allege any facts establishing municipal  
14 liability. *Id.* at 6. Because it was clear to Judge Simon that  
15 Plaintiff could not cure these deficiencies by amendment, he  
16 ordered that the dismissal was with prejudice. *Id.*

17 Roughly a year later, in a somewhat analogous case, Judge  
18 Brown granted an application to proceed in forma pauperis and  
19 dismissed Plaintiff's complaint with prejudice, where he alleged,  
20 *inter alia*, that the United States Government was violating the  
21 First Amendment rights of citizens by "allowing foreign nationals  
22 to commit crimes on our lands and attack our people with chemical,  
23 biological, and other weapons." *Todd v. United States*, 3:12-cv-  
24 01961-BR, slip op. at 1-2 (D. Or. Nov. 29, 2012).

25 About four months later, on March 20, 2013, Judge Jelderks  
26 granted an application to proceed in forma pauperis in a separate  
27 proceeding, dismissed Plaintiff's complaint against the City of  
28 Portland and State of Oregon with prejudice, and denied Plaintiff's

1 motion for appointment of pro bono counsel as futile. *Todd v. City*  
 2 *of Portland*, No. 3:12-cv-2239-JE, 2013 WL 1562965, at \*1-3 (D. Or.  
 3 Mar. 20, 2013).<sup>1</sup> In that case, Plaintiff "allege[d] that the City  
 4 of Portland and State of Oregon have taken the property of  
 5 'homeless people' and discriminated against Plaintiff and all  
 6 American citizens in favor of 'illegal foreign nationals.'" *Id.* at  
 7 \*1. He further alleged that "the City of Portland [wa]s using  
 8 'their Parks department to attack homeless people by taking their  
 9 property and not enforcing laws to protect the general public,'" *id.*,  
 10 and that the State of Oregon was "pursuing a pattern of  
 11 discrimination against American citizens 'in favor of illegal  
 12 foreign nationals because of their money benefits' which [wa]s  
 13 'creating a slave class and causing the death of American  
 14 citizens,'" *id.*

15 Citing Eleventh Amendment immunity principles, Judge Jelderks  
 16 concluded that Plaintiff's claims against the State of Oregon  
 17 necessarily failed. *Id.* at \*2. Judge Jelderks similarly concluded  
 18 that Plaintiff's claims against the City of Portland should be  
 19 dismissed for failure to state a claim:

20 Plaintiff's claims against the City of Portland should be  
 21 dismissed for failure to state a claim. As a threshold  
 22 matter, Plaintiff lacks standing to bring any claim based  
 23 on allegations that the City is using its Parks  
 Department to 'attack homeless people by taking their  
 property' and 'failing to enforce laws to protect the  
 general public.'

24 Furthermore, municipalities may only be held liable  
 25 under § 1983 if the alleged constitutional deprivation is  
 26 the result of execution of a municipality's governmental  
 policy or custom.

---

27 <sup>1</sup> Judge Mosman adopted Judge Jelderks' Findings and  
 28 Recommendation as his own opinion on April 10, 2013.

1 Even construing the pleadings liberally, the  
2 allegations against the City of Portland fail to support  
3 a claim upon which relief can be granted. Plaintiff's  
4 allegation that the 'Parks Department left an eviction  
5 type notice' at his camp in Forest Park is insufficient  
6 to assert constitutional violations by the City of  
Portland. Likewise, Plaintiff's allegation that Portland  
Police failed to take a report about 'assaults and  
gunfire' is overly vague and ultimately insufficient to  
support a claim against the City of Portland for any  
deprivation of Plaintiff's constitutional rights.

7 Plaintiff has not alleged any facts that might  
8 subject any of the named defendants to liability under  
9 any cognizable legal theory. Therefore, Plaintiff's  
10 complaint should be dismissed and, because it is apparent  
that the deficiencies of the complaint cannot be cured by  
amendment, the dismissal should be with prejudice.

11 *Id.* at \*2-3 (internal citations omitted).

## 12 **II. LEGAL STANDARD**

13 It settled law that a district court must undergo a  
14 preliminary screening of an in forma pauperis complaint and dismiss  
15 any claims which: (1) fail to state a claim on which relief may be  
16 granted; (2) are frivolous or malicious; or (3) seeks monetary  
17 relief against a defendant who is immune from such relief. 28  
18 U.S.C. § 1915(e)(2)(B); see also *Lopez v. Smith*, 203 F.3d 1122,  
19 1129 (9th Cir. 2000) (concluding that § 1915(e)(2)(B) applies to  
20 non-prisoners).

21 In order to state a claim for relief, a complaint must contain  
22 "a short and plain statement of the claim showing that the pleader  
23 is entitled to relief." FED. R. CIV. P. 8(a)(2). When reviewing  
24 the sufficiency of a complaint filed by a pro se litigant, the  
25 court must liberally construe the pleading and accept as true all  
26 of the factual allegations contained therein. *Erickson v. Pardus*,  
27 551 U.S. 89, 94 (2007). But "the tenet that a court must accept as  
28 true all of the allegations contained in a complaint is

inapplicable to legal conclusions," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Rather, stating a claim requires "the plaintiff [to] plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

Along similar lines, a district court may dismiss a claim as factually frivolous when the facts alleged "lack[] an arguable basis in law or in fact," *Neitzke v. Williams*, 490 U.S. 319, 325 (1989), or when they "rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them," *Denton v. Hernandez*, 504 U.S. 25, 33 (1992). A claim may also "be dismissed as frivolous where a defense is obvious on the face of the complaint." *Harris v. Rodriguez*, No. 1:12-cv-00891, 2012 WL 4210118, at \*4 (E.D. Cal. Sept. 18, 2012) (citing *Franklin v. Murphy*, 745 F.2d 1221, 1228-29 (9th Cir. 1984)).

### III. DISCUSSION

#### A. State of Oregon

Plaintiff brings a First Amendment claim against the State of Oregon based on an alleged "conspiracy to violate Constitutional freedoms, with knowledge of [P]laintiff['s] relig[i]ous and political view[s]." (Compl. at 3.) Although the complaint itself does not specify a statutory basis for his First Amendment claim, the Court presumes Plaintiff's claim against the State of Oregon is brought pursuant to 42 U.S.C. §§ 1983 and/or 1985. Section 1983 "authorizes a remedy against state actors for constitutional

violations," *Cerrato v. San Francisco Cmty. College Dist.*, 26 F.3d 968, 972 n.5 (9th Cir. 1994), while § 1985 "authorizes a remedy against state actors who have conspired to deprive an individual of his civil rights." *Id.* at 972 n.6.

The doctrine of sovereign immunity, which is set out in the Eleventh Amendment, applies when civil rights claims are brought against the State of Oregon. See *Young v. Hawaii*, 911 F. Supp. 2d 972, 982 (D. Haw. 2012) (making an analogous observation). Under this doctrine, "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974); *Howard v. Oregon Dep't of Corrections*, No. 6:10-cv-06390-AA, 2013 WL 4786483, at \*2 (D. Or. Sept. 5, 2013).

There are exceptions to the doctrine of sovereign immunity, however. "When acting pursuant to its authority under § 5 of the Fourteenth Amendment, Congress can abrogate the sovereign immunity of the states." *Pittman v. Oregon Employment Dep't*, 509 F.3d 1065, 1071 (9th Cir. 2007). The doctrine "also does not bar suits for prospective injunctive relief against individual state officials acting in their official capacity."<sup>2</sup> *Id.* "Moreover, a state may waive its Eleventh Amendment immunity—by, for example, removing an action to federal court." *Id.*

Congress did not abrogate the sovereign immunity of the states when enacting §§ 1983 and 1985. *Young*, 911 F. Supp. 2d at 983; see also *Pittman*, 509 F.3d at 1071 (collecting cases). In addition, the State of Oregon did not remove this action to federal court,

---

<sup>2</sup> Plaintiff has not sought prospective injunctive relief in this action.

nor does it appear that the State of Oregon has waived its sovereign immunity from suit in federal court for civil rights actions. See *McCall v. Oregon*, No. 3:12-CV-00465-PK, 2013 WL 6196966, at \*8 (D. Or. Nov. 13, 2013) ("The State of Oregon has not waived its immunity [in this § 1983 case].") In light of the fact that the State of Oregon is immune from suit, the Court concludes that Plaintiff's First Amendment claim against is the State of Oregon is frivolous and, therefore, should be dismissed with prejudice.

#### **B. Washington County**

Plaintiff brings a First Amendment claim against Washington County based on the knowing allowance of "false criminal charges to be prosecuted against [him]." (Compl. at 3.) Local governmental units or municipalities, such as Washington County, can be sued as a person under § 1983 when official policy results in a constitutional violation. *Hervey v. Estes*, 65 F.3d 784, 791 (9th Cir. 1995) (citing *Monell v. Dep't of Soc. Servs. of the City of New York*, 436 U.S. 658, 690 (1978)). In order to establish *Monell* liability, Plaintiff must prove: "(1) that [he] possessed a constitutional right of which he was deprived; (2) that the municipality had a policy; (3) that this policy amounts to deliberate indifference to [his] constitutional right; and (4) that the policy is the moving force behind the constitutional violation." *Plumeau v. Sch. Dist. No. 40 County of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997) (internal quotation marks and citation omitted).

In addition to failing to satisfy Rule 8 and the facial plausibility standard, it appears that Judge Simon addressed and



1 disposed of Plaintiff's claims against Washington County regarding  
2 the prosecution of "false criminal charges." As in the case before  
3 Judge Simon, Plaintiff's claim against Washington County cannot be  
4 cured through amendment. Accordingly, Plaintiff's claim against  
5 Washington County should be dismissed with prejudice.

6 **C. City of Portland**

7 Lastly, Plaintiff brings a First Amendment claim against the  
8 City of Portland for "not allowing [a] place for homeless." (Compl.  
9 at 3.) The Ninth Circuit specifically addressed how a plaintiff  
10 could establish *Monell* liability against the City of Portland in  
11 *Price v. Sery*, 513 F.3d 962 (9th Cir. 2008). As the Ninth Circuit  
12 explained,

13 The Supreme Court has held that municipalities may  
14 be held liable as 'persons' under § 1983 when execution  
15 of a government's policy or custom, whether made by its  
16 lawmakers or by those whose edicts or acts may fairly be  
17 said to represent official policy, inflicts the injury.  
18 A plaintiff may also establish municipal liability by  
19 demonstrating that (1) the constitutional tort was the  
20 result of a longstanding practice or custom which  
constitutes the standard operating procedure of the local  
government entity; (2) the tortfeasor was an official  
whose acts fairly represent official policy such that the  
challenged action constituted official policy; or (3) an  
official with final policy-making authority delegated  
that authority to, or ratified the decision of, a  
subordinate.

21 *Id.* at 966 (internal quotation marks and citations omitted).

22 In addition to failing to satisfy Rule 8 and the facial  
23 plausibility standard, it appears that Judge Jelderks addressed and  
24 disposed of Plaintiff's claims against the City of Portland  
25 relating to the treatment of homeless people. As in the case  
26 before Judge Jelderks, Plaintiff's allegations against the City of  
27 Portland cannot be cured through amendment. Accordingly,

1 Plaintiff's claim against the City of Portland should be dismissed  
2 with prejudice.

3 **IV. CONCLUSION**

4 For the reasons stated, Plaintiff's application (Docket No. 1)  
5 to proceed in forma pauperis is granted solely for the purpose of  
6 this Initial Review Order, Plaintiff's complaint should be  
7 dismissed with prejudice, and Plaintiff's motion (Docket No. 3) for  
8 appointment of pro bono counsel should be denied as futile.

9 **V. SCHEDULING ORDER**

10 The Findings and Recommendation will be referred to a district  
11 judge. Objections, if any, are due **February 24, 2014**. If no  
12 objections are filed, then the Findings and Recommendation will go  
13 under advisement on that date. If objections are filed, then a  
14 response is due **March 13, 2014**. When the response is due or filed,  
15 whichever date is earlier, the Findings and Recommendation will go  
16 under advisement.

17 Dated this 3rd day of February, 2014.

18 /s/ Dennis J. Hubel

19 \_\_\_\_\_  
20 DENNIS J. HUBEL  
21 United States Magistrate Judge  
22  
23  
24  
25  
26  
27  
28